Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling That State	)	
Commissions May Not Regulate Broadband	)	WC Docket No. 03-251
Internet Access Services By Requiring BellSouth	)	
To Provide Wholesale or Retail Broadband	)	
Services to CLEC UNE Voice Customers	)	
	)	
	)	

COMMENTS OF Z-TEL COMMUNICATIONS, INC.

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EXECUTIVE SUMMARY

BellSouth has adopted an overtly discriminatory policy under which it refuses to provide (and, indeed, withdraws) DSL service to consumers opting to purchase local voice services from a competitive local exchange carrier ("CLEC"). Four state commissions have found that obviously anticompetitive policy both unlawful under pre-existing state laws intended to foster competition and protect consumers, and inconsistent with the pro-competitive goals of the 1996 Act. BellSouth now approaches this Commission with the far-fetched claim that the 1996 Act – designed, of course, to make local voice competition possible – somehow prevents state commissions from eliminating discriminatory policies adopted by incumbent local exchange carriers ("ILECs") to protect their historical monopolies in the voice market. BellSouth's claim fails both substantively and procedurally.

As a procedural matter, BellSouth's Petition seeks redress in the wrong venue. Section 252(e)(6) of the Act provides that when "a State commission makes a determination under [section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court . . . ." Three of the four decisions challenged by BellSouth were obviously "determination[s] under" section 252, and the fourth similarly involved construction of BellSouth's section 251(c)(3) obligations. The courts are unanimous that appellate jurisdiction over state section 252 rulings lies exclusively in the district courts, and "the statute does not authorize the Commission to sit as an appellate tribunal to review the correctness of state resolution of such disputes." BellSouth's effort to circumvent the statutorily prescribed process must be rejected.

Substantively, BellSouth's claim that the state commission decisions are inconsistent with federal law is flatly wrong. Indeed, although BellSouth invokes the preemption standard of section 251(d)(3), it does not seriously attempt to demonstrate that the challenged orders would "substantially prevent implementation" of the federal regime. And for good reason – far from preventing implementation of the federal regime, the state commission decisions clearly *advance* the 1996 Act's core goals of enabling local voice competition and encouraging deployment of advanced services.

BellSouth's argument that the state commission decisions are inconsistent with this Commission's *Triennial Review Order* ("*TRO*") both misreads the *Order* and misunderstands the state decisions. The heart of BellSouth's claim is that the *TRO* prohibits state commissions from ordering any unbundling beyond that required by the federal regime. But that is not so – the *TRO* prohibits only additional unbundling that would "substantially prevent" implementation of the federal scheme. More importantly, BellSouth fails to realize that *the state decisions do not require any further unbundling*. Rather, they merely regulate one aspect of the terms and conditions of BellSouth's DSL service, by providing that the ILEC may not withdraw that service in a patently discriminatory fashion.

BellSouth's lengthy disquisition on the Commission's policy that "information services" remain unregulated is simply irrelevant. Under the Commission's precedents, BellSouth's DSL service is obviously not an "information service," but a "telecommunications service" because BellSouth combines the provision of Internet access with broadband transmission capability. The Ninth Circuit's recent decision in the *Brand X* case confirms that fact. Moreover, if BellSouth's position were correct, it would

lead to patently absurd results, transforming POTS service into an unregulated "information service" just because basic local service customers can use their POTS lines to access the Internet.

BellSouth's argument that DSL cannot be regulated by the states because it is "subject to the exclusive authority of this Commission" under the *GTE ADSL Order* grossly misreads that decision. While the Commission has found that DSL rates should be tariffed at the federal level, nothing in the *GTE ADSL Order* remotely suggests an intent to preempt the states' traditional police powers to regulate the terms and conditions of services offered to their citizens. Moreover, BellSouth ignores the fact that, under the 1996 Act, state commission authority is *not* limited strictly to intrastate matters. As the courts and this Commission have acknowledged, state commission authority under section 252 also extends to interstate issues that arise in the context of arbitration of interconnection agreements.

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COMMENTS OF Z-TEL COMMUNICATIONS, INC.

INTRODUCTION

BellSouth has improperly petitioned this Commission to reverse the judgments of four state commissions that prohibit an overtly discriminatory policy under which BellSouth refuses to provide (and, indeed, withdraws) DSL service to consumers opting to purchase local voice services from a competitive local exchange carrier ("CLEC"). Z-Tel Communications, Inc. ("Z-Tel") is a CLEC providing local and long-distance services in every one of BellSouth's in-region states by means of unbundled network elements ("UNEs"), in particular, the UNE platform. Quite simply, Z-Tel, and Z-Tel's customers, are the victims of BellSouth's policy.

While BellSouth styles its Petition as an "emergency," BellSouth's refusal to sell its DSL service to customers who want to purchase voice service from a CLEC is a real source of clear and present danger to competition and consumers alike. As discussed herein, BellSouth's policy of requiring its DSL customers to purchase its analog local voice service has a chilling effect upon the development of true alternatives to BellSouth, including next-generation "Voice over

Internet Protocol" (or "VoIP") services. Moreover, BellSouth's Petition fails to support its preemption request, both substantively and procedurally. Accordingly, Z-Tel urges the Commission to swiftly and soundly dismiss BellSouth's Petition.

I. THE FCC SHOULD NOT PREEMPT STATE COMMISSION DECISIONS PROHIBITING BELLSOUTH FROM DISCRIMINATING AGAINST CLEC VOICE CUSTOMERS BY WITHDRAWING DSL SERVICE.

BellSouth asks this Commission to declare that state commission decisions prohibiting BellSouth from implementing its discriminatory policy "are preempted under 47 U.S.C. § 251(d)(3)"[1] of the Telecommunications Act of 1996 (hereinafter the "1996 Act" or the "Act"). Significantly, however, section 251(d)(3) authorizes the FCC to preempt "any regulation, order, or policy of a State Commission" only when it "substantially prevent[s] implementation" of section 251. 47 U.S.C. § 251(d)(3). BellSouth's Petition falls far short of demonstrating that any of the challenged state commission decisions satisfy that high standard for preemption. In fact, as one federal district court has already found, those decisions actually *advance* the core purposes of the 1996 Act.[2]

There is, of course, no question that the Act accords state commissions substantial authority. As the Ninth Circuit has explained, "[t]he Federal Communications Commission is charged with the responsibility of promulgating regulations necessary to implement the Act

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[1] *BellSouth Petition* at 4. In these Comments, Z-Tel addresses the preemption standard of section 251(d)(3) proposed by BellSouth. Notably, however, the result here would be no different under federal common law preemption principles. BellSouth does not (and cannot) suggest either that Congress has "preempted the field" under the 1996 Act, or that there is any specific "conflict" between state and federal law such that it would be impossible to comply with both. Accordingly, under traditional preemption principles, BellSouth would need to show that the state commission decisions "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As set forth directly below, however, those decisions actually *advance* the core purposes of the 1996 Act.

itself, but the Act reserves to states the ability to impose additional requirements so long as the requirements are consistent with the Act and 'further competition.'"[3] Perhaps most significantly, under section 252, state commissions are charged with responsibility for arbitrating and approving interconnection agreements, including setting rates for unbundled elements, ensuring non-discriminatory terms, and safeguarding the public interest, convenience, and necessity. *See, e.g.,* §§ 252(b)(1), 252(c), and 252(e). In the specific context of interconnection agreements, state commissions have jurisdiction under section 252(c) to "resolv[e] by arbitration . . . any open issue and impos[e] conditions upon" incumbent and competitive carriers – including issues and conditions that relate to interstate telecommunications – that are presented and negotiated in interconnection agreements.[4] In addition, in arbitrating and approving those section 252 interconnection agreements, state commissions may continue to "establish[] and enforc[e] other requirements of state law." *See* §§ 252(e)(3) and 253.

The purpose of section 251(d)(3)'s express "preservation" of state regulations, orders, or policies "consistent with the requirements of this section" must be viewed against the backdrop of the history of local competition in the telecommunications market at the time the 1996 Act was enacted. At that time, many state commissions were trying to open local markets to

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[2] *BellSouth Telecomm., Inc. v. Cinergy Comm. Co.*, 2003 U.S. Dist. LEXIS 23976 (E.D. Ky., Dec. 29, 2003) ("*Cinergy*").

[3] *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1265 (9th Cir. 2000); *see also Michigan Bell Tel. Co. v. MCIMetro Access Transmission Serv.'s, Inc.,* 323 F.3d 348, 358 (6th Cir. 2003) ("*Michigan Bell*") ("When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition . . . ") (emphasis in original).

[4] Section 252(b)(4)(C) gives state commissions the power to "resolve each issue set forth" in an interconnection arbitration petition and to "impos[e] appropriate conditions as required to implement subsection [252](c) upon the parties to the agreement . . ." 47 U.S.C. § 252(b)(4)(C).

competition (sometimes with the agreement or by request of the incumbent local exchange carriers ("ILECs") themselves). As the Commission recognized in the *First Local Competition Order*, the 1996 Act concepts of interconnection and unbundling built upon initiatives initially undertaken at the state level. And since the 1996 Act was the product of these state initiatives, it was logical that Congress would be careful not to undermine them. Section 251(d)(3) was thus adopted to preserve the state authority over the development of local competition necessary to allow state experimentation to continue.

Notwithstanding this history and the express acknowledgements of state commission authority under the Act, in 1996 this Commission attempted to preempt *any* state rule extending unbundling beyond that required by the Commission's own rules.[5] That attempt was squarely reversed by the Eighth Circuit, which held that "subsection 251(d)(3)" was intended by Congress "to shield state access and interconnection orders from FCC preemption."[6] Indeed, the Eighth Circuit emphasized that "the FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state . . . access regulation . . . to vary from a specific FCC regulation and yet . . . not substantially prevent the implementation of section 251." 120 F.3d at 806. Accordingly, the court expressly rejected the FCC's conclusion "that merely an inconsistency between a state rule and a Commission regulation" justifies preemption.[7] In its recent *Triennial Review Order*, the Commission acknowledged that

[5] *See Iowa Util.'s Bd. v. FCC*, 120 F.3d 753, 807 (8th Cir. 1997) ("*Iowa Utilities Board*").

[6] *Id.*

[7] *Id.*

the "Eighth Circuit's opinion reinforces the language of the section"; state orders or regulations "must 'substantially prevent' the implementation of the federal regime to be precluded."[8]

Appellate court and Commission precedent thus clearly indicates that the challenged decisions of the Georgia, Kentucky, Louisiana, and Florida commissions cannot be preempted because they require a result that is merely "different" from the baseline set by the FCC's unbundling rules. For preemption to apply, state action must "substantially prevent" implementation of the Act's purposes. In fact, however, as set forth below, the state decisions actually advance the Act's goals of competition and innovation.

A. The State Commission Decisions *Advance* The 1996 Act's Core Goal of Promoting Local Voice Competition.

As the Supreme Court has indicated, the core goal of the 1996 Act was the introduction of competition to "persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry."[9] The Act was "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbent's property."[10] The state commission decisions challenged by BellSouth – far from "substantially preventing" implementation of the federal regime – *advance* that fundamental purpose of the Act.

As the Georgia Public Utilities Commission explained, "[i]t is undisputed that under BellSouth's policy, [a CLEC] voice customer cannot receive BellSouth's [DSL] service; whereas

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[8] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 2003 FCC LEXIS 4697 at *307 (¶ 192 n.611) (rel. Aug. 21, 2003) ("*TRO*").

[9] *Verizon v. FCC*, 535 U.S. 467, 475-76 (2002) ("*Verizon*").

[10] *Id.* at 489.

a BellSouth voice customer may receive this service."[11] That commission found that the "motivation behind BellSouth's policy is to maintain its voice customers by denying them options in a separate market" for DSL services.[12] The commission further found that BellSouth thereby "insulates [its] voice service from competition."[13] Clearly, allowing an incumbent monopolist to "insulate[] its voice service from competition" would be flatly inconsistent with the 1996 Act's purpose of "reorganiz[ing] [local services] markets by rendering regulated utilities' monopolies vulnerable to [competitive] interlopers."[14] The state commissions' rulings, in contrast, advance that goal.

The other state commission decisions challenged here made findings similar to those of the Georgia commission regarding the negative effect of BellSouth's policy on local voice competition. The Florida Public Service Commission found that "BellSouth's practice of disconnecting customers" from BellSouth DSL service when the customers switched to CLEC voice services "raises a competitive barrier in the voice market."[15] The Florida commission concluded that its obligation to promote local voice competition under both the 1996 Act and state law required it to prohibit BellSouth from "unreasonably penaliz[ing] customers who

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[11] *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Order on Complaint, 2003 Ga. PUC LEXIS 38, at *11-*12 (Oct. 21, 2003) ("*Georgia Order*").

[12] *Id.* at *42.

[13] *Id.* at *43.

[14] *Verizon*, 535 U.S. at 489.

[15] *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Final Order on Arbitration, 2002 Fla. PUC LEXIS 401 at *12 (June 5, 2002) ("*Florida Order*").

desire" CLEC voice services.[16] The Louisiana Public Service Commission stated in no uncertain terms that its "policy is to support competition in all telecommunications markets," including local voice service, and that the "anti-competitive affects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited."[17] Finally, the Kentucky Public Service Commission found that BellSouth's "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers."[18] The Kentucky commission further found that BellSouth's policy "undercuts our own long-held policy [of promoting local voice competition] and, in the long run, will result in fewer viable CLECs, and thus fewer customer options."[19] Importantly, the United States District Court for the Eastern District of Kentucky agreed, finding that the Kentucky commission's decision will "ameliorate a chilling effect on competition for local telecommunications" without "substantially prevent[ing] implementation of federal statutory requirements."[20]

This Commission must recognize, as the state commissions have, that BellSouth's policy makes sense for it only because it possesses market power in providing DSL service – market power derived from its position as a historical monopolist. The Georgia commission, for

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[16] *Id.* at *16.

[17] *BellSouth's provision of ADSL Service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22232-E*, Order R-26173, 2002 La. PUC LEXIS 20 at *12 (Jan. 24, 2003) ("*Louisiana Order*").

[18] *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252,* Order, Case No. 2001-00432 at 7 (July 12, 2002) ("*Kentucky Order*").

[19] *Id.* at 8.

[20] *Cinergy,* 2003 U.S. Dist. LEXIS 23976 at *20.

example, found that BellSouth had "an advantage over CLECs in establishing a DSL network and competing in the high speed internet market" because it inherited facilities of massive scale and scope that are capable of serving every customer in its footprint.[21] This regulatory "head-start" is perpetuated by the fact that most DSL customers do not want to change their service provider for several reasons, such as a desire to avoid early termination penalties and new connection fees, or changing their email addresses.[22] Based on these facts, the Georgia commission found no basis for BellSouth's claim that its DSL policy does not harm local voice competition because CLECs have other alternatives – such as self-provisioned DSL or line-splitting arrangements – to offer broadband service to their customers. To the contrary, "[i]f BellSouth believed that customers would pursue these other options," the Georgia commission explained, "then it could not afford to continue its policy. The whole premise has to be that customers are not likely to leave BellSouth's DSL service for these other options."[23]

In fact, after extensive hearings, testimony, and briefing, all four state commissions found *no* other purpose for BellSouth's discriminatory DSL policy. The Florida commission found no evidence in the record to show that "BellSouth cannot provision its [DSL] service over a [CLEC] voice loop or that doing so would be unduly burdensome."[24] Likewise, the Kentucky commission found "no evidence that the provision of DSL and voice over the same loop is not technically feasible."[25] Rather, BellSouth's DSL policy is merely "the result of a business decision by BellSouth" to leverage its historical monopoly power to restrict the development of

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[21] *Georgia Order*, 2003 Ga. PUC LEXIS 38 at *35.

[22] *Id.* at *44.

[23] *Id.* at *43.

[24] *See Florida Order,* 2002 Fla. PUC LEXIS 401 at *16

[25] *Kentucky Order* at 4.

competition in the local voice market.[26] The Georgia commission – while acknowledging that "BellSouth will inevitably lose some DSL customers because of this policy" – concluded that "the only reasonable assumption is that BellSouth believes that it will keep enough voice customers that would have otherwise departed for a preferred CLEC that BellSouth will still come out ahead financially."[27] Such an outcome cannot be squared with the market-opening goals of the 1996 Act.

In short, each of the state commission decisions correctly found that BellSouth's DSL policy will reinforce BellSouth's market power and undercut local voice competition. Allowing BellSouth's policy to stand would thus have "substantially interfered" with the core goals of the 1996 Act – prohibiting that practice clearly does not.

B. The State Commission Decisions *Promote* Broadband Competition.

Just as the challenged state commission decisions advance – rather than "substantially prevent" – the development of competition in former monopoly markets for local voice services, they also promote the 1996 Act's goal of fostering the competitive deployment of advanced services.

At the outset, it is important to recognize that encouraging the deployment of advanced services, including broadband Internet access, is not solely the responsibility of the FCC. To the contrary, section 706 provides that "[t]he Commission and *each State commission* … shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by adopting "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure

[26] *Florida Order,* 2002 Fla. PUC LEXIS 401 at *16.

[27] *Georgia Order,* 2003 Ga. PUC LEXIS 38 at *43.

investment."[28] It is significant that section 706 envisions that "advanced services" will be deployed in a *competitive* setting – deployment of advanced services encouraged by measures that *reinforce* the local telecommunications monopoly is inconsistent with section 706 and the Act as a whole.

Consistent with their specific mandate under section 706, the state commissions considered and rejected BellSouth's argument that prohibiting its DSL policy will discourage broadband deployment, and instead found that prohibiting this discriminatory tying arrangement will promote competition.[29] For example, the Florida commission explained that its decision "supports the deployment and adoption of advanced services as promoted by Section 706 of the Act, by removing significant barriers that limit customer choice in the local voice market."[30] The Louisiana commission found that as a result of prohibiting its discriminatory DSL policy, "BellSouth will derive more revenue for its [DSL] service, in addition to furthering competition in the voice market."[31] Accordingly, "if any disincentive exists prohibiting BellSouth from further deploying its [DSL] service, it [i]s the demand for the product."[32] Likewise, the Georgia commission found that "[a]ny implication that as a result of this order BellSouth would be discouraged from investing in innovative technology in the future appears wholly inconsistent

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[28] 47 U.S.C. § 157nt (emphasis added). *See also Florida Order,* 2002 Fla. PUC LEXIS 401 at *12-*13 (explaining that its decision to prohibit BellSouth's DSL policy is fully consistent with the goals contained in section 706).

[29] *See BellSouth Petition* at 15-17.

[30] *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Order Denying Motions for Reconsideration, Cross-Motion for Reconsideration and Motion to Strike, 2002 Fla. PUC LEXIS 864 at *9 (Oct. 21, 2002) ("*Florida Order on Reconsideration*").

[31] *Louisiana Order,* 2002 La. PUC LEXIS 20 at *25.

[32] *Id.* at *24-*25.

with the record," which "reflects that BellSouth has an overwhelming majority of the DSL lines in Georgia and that DSL, despite a relatively late start, has overtaken cable modems in Georgia."[33]

Section 706 makes clear that state commissions are equal partners with the FCC in "encourag[ing] deployment … of advanced telecommunications capability . . . to all Americans." As such, a state commission's decision about how to best ensure the delivery of advanced services to its citizens, such as the decisions challenged by BellSouth's Petition, should be given substantial deference by the FCC.

Further, while the state commissions have found that restricting BellSouth's discriminatory policy will not delay DSL deployment, permitting that policy to stand clearly *will* have a negative effect on the deployment of the coming generation of VoIP services by entities other than cable and ILEC owners of bottleneck transmission facilities. Chairman Powell recently expressed his enthusiasm for VoIP, explaining that "Internet Voice will unleash a torrent of innovative products and services, from many more sources than we are accustomed to, if we let it."[34]

Today, an end user customer must employ a broadband facility – typically a DSL or cable modem line – to obtain the transmission capability necessary to take advantage of VoIP. But, again, BellSouth's policy requires its customers to buy local, circuit-switched voice service in order to get its DSL service. This erects a substantial barrier to VoIP deployment, because ILEC DSL customers are unlikely to want VoIP service from a competitive provider if they are obliged by the ILEC to buy its analog, circuit-switched voice services as a condition of receiving DSL.

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[33] *Georgia Order,* 2003 Ga. PUC LEXIS 38 at *50-*51.

[34] Remarks of Chairman Michael K. Powell, National Press Club (Jan. 14, 2004) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-242885A1.doc.

The resulting disincentives to entering the VoIP market will be substantial. With DSL/analog voice tying arrangements in place, VoIP providers will be reduced to competing for niche market "second-line" voice applications, as opposed to developing into true, primary-line replacements for analog dialtone. This decrease in market opportunity for VoIP providers will necessarily decrease innovation, investment, and entry into markets for these emerging technologies and applications. In short, if BellSouth has its way, "the 'killer app' we have all been awaiting to bolster marketplace incentives to build out broadband facilities to all Americans" may not materialize.[35]

But then, that's the whole point: BellSouth's ultimate goal is to "wall off" its local customers from the forces of competition. With this kind of tying arrangement, it will be able to control the pace of technological change and the extent of new services available to consumers. Moreover, permitting BellSouth's policy to stand would set the unfortunate precedent that the owner of the underlying broadband network facility may require its customers to purchase additional services as a condition to obtaining broadband service.

Other ILECs are following BellSouth's lead. Qwest now refuses to sell DSL service to a customer unless the customer also purchases local voice service. And Qwest customers, like the majority of BellSouth customers, do not have an alternative DSL provider. Moreover, Qwest recently implemented a new pricing regime requiring customers to purchase a $28 (or higher) "extended basic" package of Qwest local voice services as a condition precedent to receiving DSL service. If the customer buys only Qwest's basic voice package, Qwest raises the price of

[35] Remarks of Commissioner Kathleen Q. Abernathy, Catholic University, Columbus School of Law (Jan. 22, 2004) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243135A1.doc.

DSL by $13 per month, from $31.95 to $44.95.[36] For most mass market customers, this policy eliminates any economic incentive to add even an inexpensive (*e.g.,* $20) VoIP package from a competitive provider, since any customer savings from moving to VoIP are unlikely to offset the DSL cost hike accompanying termination of Qwest's analog voice service.[37] In short, if the Commission allows the providers of local bottleneck transmission facilities to continue to adopt such policies, those providers will be able to block deployment of new VoIP applications, to the ultimate detriment of consumers.

C. The State Commission Decisions Redress An Overtly Discriminatory ILEC Policy.

As we have shown, the state commission decisions *advance* the purposes of the Act, and therefore are not subject to preemption on the theory that they "substantially prevent implementation" of the purposes of the Act under section 251(d)(3)(C). Nor is preemption warranted on the theory that the decisions are inconsistent with the terms of the Act under section 251(d)(3)(B). To the contrary, BellSouth's policy runs afoul of the nondiscrimination requirements that Congress repeatedly inserted into the Act, and the state commission decisions merely enforce that requirement.

In passing the 1996 Act, Congress appears to have been nearly obsessed with prohibiting discrimination. The provision requiring ILECs to unbundle network elements, section 251(c)(3), doubly prohibits discrimination by requiring "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ." The second item on the section 271 checklist both incorporates section 251(c)(3)'s two nondiscrimination requirements by cross-reference and adds

[36] *See* Dave Burstein, *Qwest: Keep VOIP Off Our DSL Lines*, DSL PRIME (Dec. 31, 2003) *available* at http://www.dslprime.com/news_articles.htm.

a third, by requiring "Nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1)."

The Supreme Court made clear in *Verizon* that the statutory nondiscrimination rule requires ILECs to treat CLECs the way they treat themselves. At issue was the Commission's "additional combinations rule" requiring ILECs to combine network elements that "'are not ordinarily combined in the incumbent['s] network.'"[38] The Court held that the rule "is justified by the statutory nondiscrimination requirement."[39] The Court explained that, even though the ILEC did not ordinarily combine the network elements at issue, "the incumbent would provide the combination itself if a customer wanted it or it otherwise served a business purpose," and CLECs are to be put "on an equal footing with the incumbent."[40]

BellSouth's policy is inherently discriminatory. Indeed, this is an easier case than the additional combinations rule. There, the issue was whether an ILEC was required to do something for a CLEC that the ILEC ordinarily did not do for itself. Here, BellSouth ordinarily will sell DSL service to anyone, but *withdraws* its DSL service to punish end-users who choose voice service from a CLEC. State actions that redress discrimination obviously further Congress's repeatedly articulated mandate that discrimination by ILECs be eliminated.

D. This Commission's Unbundling Rules Do Not Support Preemption Of These State Rulings Mandating Nondiscrimination.

BellSouth argues that, under the *TRO*, state commissions have "no authority to order unbundling of a network element" that the Commission has not required the ILECs to unbundle, and that the *TRO* sets a "national policy" for unbundling network elements with which the

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[37] *Compare id.*

[38] *Verizon*, 535 U.S. at 537, *quoting* 47 C.F.R. § 51.315(c).

[39] *Verizon*, 535 U.S. at 537.

challenged state decisions are allegedly in conflict.[41] That argument is misguided in several critical respects.

First, and most importantly, even if BellSouth were correct that state commissions have "no authority to order unbundling of a network element" that this Commission has declined to unbundle, that contrived principle would have no application here. The challenged state decisions actually do not require BellSouth to "unbundle" anything.[42] And understandably so – since the BellSouth policy at issue is its refusal to *sell a DSL service* to customers of CLECs, a rule merely requiring "unbundling" of some element of BellSouth's local facilities would be, at best, an imprecise method of correcting the problem. The more direct remedy is precisely what the state commissions did here – requiring BellSouth to eliminate the unlawful tie between local, intrastate voice service and its DSL service. The challenged decisions are unremarkable examples of state commissions ordering a sensible remedy for violations of their own state laws prohibiting discrimination and other anticompetitive conduct.[43] Nothing in the *TRO* suggests that the state commissions should not do so; to the contrary, this Commission should be loath to

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[40] *Id*. at 538.

[41] *BellSouth Petition* at 11.

[42] Even if these state commission decisions are (incorrectly) regarded as state law "unbundling" obligations, BellSouth ignores the preemption standard set forth in the *TRO*. As noted *supra*, section I.A., the *TRO* expressly acknowledges that, under the Eighth Circuit's *Iowa Utilities Board* decision, a state rule cannot be preempted unless it "'substantially prevent[s]' the implementation of the federal regime." *TRO*, 2003 FCC LEXIS 4697 at *307 (¶ 192, n.611). And although BellSouth vaguely suggests that the state decisions are inconsistent with "core policies" of the *TRO*, it stops well short of maintaining that any alleged inconsistency will "substantially prevent" implementation of section 251 or the Act as a whole. *BellSouth Petition* at 15. Of course, it will not. *See supra,* section I.A.

[43] *See, e.g., Georgia Order* at 19 ("BellSouth's practice violates the [state law] prohibition . . . against anticompetitive acts . . ."); *Florida Order* at 11 (finding that BellSouth's policy "unreasonably penalizes [CLEC] customers" in contravention of Florida law prohibiting carriers from subjecting customers to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever").

preempt state commission efforts to protect consumers, as that is a realm in which state authority is at its zenith.[44]

Second, BellSouth's reliance on the *TRO*'s rejection of line-sharing is utterly unavailing.[45] In the *TRO*, the Commission explained its view that line-sharing should be eliminated because the regime in place purportedly gave DSL service providers "an irrational cost advantage over competitive LECs purchasing the whole loop and over incumbent LECs" in the provision of DSL services.[46] According to the Commission, this risked "skew[ing] competitive LECs incentives toward providing a broadband-only service to mass market consumers."[47] As a result, the Commission found that ILECs should not be obliged to provide the high frequency portion of the loop ("HFPL") as a separate UNE.

Although Z-Tel believes the Commission's concern in the *TRO* unfounded, right or wrong, it clearly is not implicated here. The state commission decisions do not give any CLEC an "irrational cost advantage" of any sort – they merely require BellSouth to continue to provide profitable DSL services to CLEC voice customers as well as BellSouth's own voice customers.

BellSouth also argues that the state decisions somehow conflict with the *TRO*'s ruling that during the three-year transition away from line-sharing, ILECs are only required to continue providing unbundled HFPL if they also "continue[] to provide . . . voiceband services on the

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[44] For example, in upholding the California Public Utilities Commission's authority to suspend a carrier for slamming, the Ninth Circuit explained that the carrier's "preemption argument misinterprets the purpose of the Act," which "was designed to prevent explicit prohibitions on entry by a utility into telecommunications, and thereby to protect competition in the industry while allowing states to regulate to protect consumers against unfair business practices." *Communications Telesystems Int'l v. California Pub. Util.'s Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999). *See also Ting v. AT&T,* 319 F.3d 1126 (9th Cir. 2003) (finding that state contract and consumer protection laws are not preempted by sections 201(b) and 202(a) of the Act).

[45] *See BellSouth Petition* at 12-17.

[46] *TRO,* 2003 FCC LEXIS 4697 at *403 (¶ 260).

particular loop over which the requesting carrier seeks access to provide ADSL service."[48] Of course, the Commission's line-sharing transition rules are written this way because they *only* address the situation in which a CLEC provides DSL and the ILEC provides analog voice service. Here, in contrast, the issue relates to customers that seek to purchase DSL from an ILEC like BellSouth, and analog voice service from a CLEC. In that circumstance, the challenged state decisions do *not* purport to require *either* the high *or* the low frequency portion of the loop to be provided as an unbundled element; they simply forbid BellSouth from overtly discriminating among customers in violation of state laws intended to protect consumers.[49]

Of course, as set forth *supra*, section I.A., BellSouth's overt discrimination has *no* legitimate business purpose. By discriminating against CLEC voice customers in the provision of its DSL services, BellSouth is obviously foregoing revenue. That makes sense *only* because while "BellSouth will inevitably lose some DSL customers because of this policy," its position as the historical monopolist has assured it such a dominant position in both the DSL and voice services that it can leverage the former to protect the latter from the competition envisioned by the Act.[50] The state commission rulings properly prohibit that highly undesirable result.

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[47] *Id.* at *404 (¶ 261).

[48] *Id.* at *417 (¶ 269).

[49] BellSouth mischaracterizes ¶ 270 of the *TRO* when it states that "[t]he Commission rejected CompTel's argument" that "the Commission mandate that ILECs continue to provide DSL-based services over UNE loops that CLECs use for voice service." *BellSouth Petition* at 12-13. In reality, CompTel sought a *separate* UNE (*i.e.,* the low frequency portion of the loop) for which a CLEC would pay one-half the approved UNE loop rate. *See* Comments of the Competitive Telecommunications Association, CC Docket No. 01-338 at 43-45 (filed April 5, 2002). In ¶ 270, the Commission ruled that it would not require unbundling of this new "low frequency portion of the loop" UNE. This is not the same as finding that BellSouth is not required to provide DSL over a "whole" loop served by a UNE-P carrier.

[50] *Georgia Order,* 2003 Ga. PUC LEXIS 38 at *42.

Moreover, BellSouth's argument that these decisions discourage CLEC deployment of new technologies is entirely disingenuous. This Commission's decision to terminate HFPL unbundling resulted in substantial part from concern that CLECs had *too much* incentive to provide DSL services, and *not enough* incentive to use the low frequency portion of the loop.[51] It makes little sense – and takes considerable gall – for BellSouth to argue that now that line-sharing has been eliminated, the Commission must come up with some new incentive to encourage DSL entry by CLECs.

BellSouth briefly suggests that the challenged state decisions are inconsistent with a number of the Commission's section 271 orders.[52] That is incorrect. In those orders, the Commission addressed CLEC arguments that the Commission should reject section 271 applications on the basis of ILEC decisions to deny DSL services to CLEC voice customers. The Commission merely held that "under [federal] rules, the incumbent LEC has no obligation to provide xDSL service over this UNE-P carrier loop."[53] That, of course, is obviously true – but, as set forth above, a "mere inconsistency" in result between federal and state requirements does not require preemption.[54] The issue is whether the state rule "substantially prevents" implementation of the federal regime, and here it does not.

II. BELLSOUTH'S BROADBAND INTERNET ACCESS SERVICE IS NOT AN "INFORMATION SERVICE" UNDER THE 1996 ACT.

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[51] *TRO*, 2003 FCC LEXIS 4697 at *404-*405 (¶ 261) (finding that the line-sharing regime risked "skew[ing] competitive LECs incentives toward providing a broadband-only service to mass market consumers").

[52] *See BellSouth Petition* at 14 n.15.

[53] *See, e.g., Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18518 (¶ 330) (2000).

[54] *Iowa Utilities Board*, 120 F.3d at 807.

Over the span of several pages, BellSouth's Petition discusses the "Commission's long-established policy . . . that interstate information services must remain *unregulated*,"[55] which BellSouth then asserts "compel[s] the conclusion that state commission orders . . . that attempt to dictate the terms and conditions of BellSouth's broadband Internet access are preempted."[56] Notably missing from this analysis, however, is any explanation of how BellSouth's FastAccess – which is BellSouth's retail broadband Internet access service – satisfies the definition of "information services" under the 1996 Act. Hence, BellSouth's analysis of the Commission's prior treatment of "information services" is irrelevant to the issues raised by BellSouth's Petition.

A. ILEC Self-Provisioned Broadband Internet Access Is A "Telecommunications Service."

"'Internet access services' are *generally* 'appropriately classed as information, rather than telecommunications, services.'"[57] But FastAccess is *not* an "information service" under the 1996 Act. FastAccess incorporates more than just Internet access; it combines Internet access with broadband transmission capability, which this Commission has "appropriately viewed as 'telecommunications service' or 'telecommunications.'"[58]

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[55] *BellSouth Petition* at 17 (emphasis in original).

[56] *Id.* at 23.

[57] *Id., citing Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11536 (¶ 73) (1998) (emphasis added) ("*1998 Report to Congress*"). "Information services" are defined in the 1996 Act as the offering of the capability "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*." 47 U.S.C. § 153(20) (emphasis added).

[58] *1998 Report to Congress,* 13 FCC Rcd at 11508 (¶ 15); *see also* 47 U.S.C. § 153(46) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used"); 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

That conclusion draws on Commission precedent, which has long distinguished the "information services" component of Internet access, traditionally provided by an Internet service provider ("ISP") (*e.g.,* web browsing, email, and so forth), from the underlying transport component. For example, in the *1998 Report to Congress*, the Commission held that while "Internet service providers leasing … lines do not provide telecommunications to their subscribers[,] . . . [t]he provision of leased lines to Internet service providers . . . constitutes the provision of interstate telecommunications."[59] In the specific case of FastAccess, the underlying transport component (*i.e.,* the DSL line) is properly classified as a "telecommunications service."[60]

This critical distinction lies at the heart of the Commission's framework for regulating Internet access. Under the current regime, a telephone company that provides transmission (*e.g.,* BellSouth) – whether "broadband" or "narrowband" – is a provider of "telecommunications services" to an ISP. The ISP (*e.g.,* Earthlink) is the user of these "telecommunications services." The ISP's end user customer is a consumer of "information services" provided by the ISP. This configuration is important, because it allocates regulatory burdens among the parties. The telephone company, which typically controls bottleneck transmission facilities, is subject to the regulatory obligations applicable to providers of "telecommunications services" under Title II of the Communications Act. The ISP, by contrast, is exempt from these requirements as a provider of "information services."

That same framework applies to BellSouth's FastAccess service. When BellSouth's affiliated ISP provides Internet access via broadband transmission capability provisioned by

[59] *1998 Report to Congress,* 13 FCC Rcd at 11533 (¶ 67).

BellSouth, nothing changes except the fact that BellSouth has stopped dealing with the public and now only deals with itself. BellSouth still is a provider of "telecommunications services" because it provides the underlying broadband transmission facilities that can be used for any number of services, including "information services." In other words, the regulatory classification of the underlying services does not change just because the name of the ISP changes.[61]

The Commission has, in fact, explained the distinction between an ISP that provisions its own transmission facilities, and an ISP that does not, in the *1998 Report to Congress*: "[I]n every case, some entity must provide telecommunications to the information service provider. When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications."[62] Further, it is self-evident that

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[60] *See GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148,* Memorandum Opinion and Order, 13 FCC Rcd. 22466, 22474-75 (¶ 16) (1998) ("*GTE ADSL Order*").

[61] BellSouth improperly cites a recent decision by a Minnesota federal district court that enjoined state regulation of VoIP services to further its argument that FastAccess is an "information service" exempt from state regulation. *See BellSouth Petition* at 21-22*, citing Vonage Holdings Corp. v. Minnesota Public Utilities Commission,* 2003 U.S. Dist. LEXIS 18451 (D. Minn. 2003) ("*Vonage*"). The *Vonage* decision is distinguishable. Most importantly for this proceeding, Vonage (unlike BellSouth) does not provide its customers with the broadband transmission capability required to access the Internet. *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* Petition for Declaratory Ruling, WC Docket No. 03-211 at 13 (filed Sept. 22, 2003). Instead, Vonage provides an Internet application to customers who already receive "telecommunications" or a "telecommunications service" from another source, usually a DSL or cable modem provider.

[62] *1998 Report to Congress,* 13 FCC Rcd at 11535 (¶ 69, n.138); *see also Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* Order on Remand, 16 FCC Rcd 9751, 9771 (¶ 38) (2001) ("[T]he very fact that the Commission recognized that a situation in which an information service provider owns the underlying transmission facilities might be cause for different treatment undercuts the BOCs' reliance on the language of the *Report to Congress* to demonstrate that the BOCs could never be deemed to be providing interLATA telecommunications when they provide an information service.").

customers do not purchase FastAccess solely to enjoy Internet applications, such as email and web browsing, which are easily classified as "information services." If that were the case, customers would be satisfied with dial-up Internet access over their POTS lines. Instead, the raw broadband transmission capability – the "telecommunications service" or "telecommunications" – provided by the underlying DSL line, standing on its own, is an important component of the service.

Notwithstanding Commission precedent, BellSouth seems to argue that combining broadband transmission capability with Internet access magically transforms the entire product into an "information service." But as the Commission explained, "it has never found that 'telecommunications' ends where 'enhanced' information service begins. To the contrary, in the context of open network architecture (ONA) elements, the Commission stated that 'an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of an [enhanced] service that is not subject to Title II.'"[63]

If BellSouth's position were correct, it would lead to patently absurd results. Today, basic local service customers can use their POTS lines to access the Internet. BellSouth's reasoning would thus transform even POTS service into an unregulated "information service" that is exempt from state regulation if BellSouth provided free dial-up Internet access to every POTS subscriber. Just as "an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail,"

[63] *GTE ADSL Order,* 13 FCC Rcd at 22477 (¶ 20) (internal citations omitted). As the Commission held in the *1998 Report to Congress,* "basic services" and "enhanced services" are essentially identical and congruent in scope to "telecommunications services" and "information services," respectively. *See 1998 Report to Congress,* 13 FCC Rcd at 11511 (¶ 21).

BellSouth should not be able to escape Title II regulation simply by packaging broadband transmission capability with Internet access.[64]

B. The *Brand X* Decision Undermines BellSouth's Regulatory Classification Argument.

BellSouth's only support for its assertion that FastAccess is an "information service" is the Commission's tentative conclusion in a pending rulemaking that wireline broadband Internet access service should be re-classified as "information service."[65] However, BellSouth cannot justify preemption based on a tentative conclusion that has not been given effect by the Commission, especially when, as discussed above, it is in direct conflict with the Commission's current rules and regulations. Moreover, it would be both inappropriate and inconsistent with the Commission's own policies to grant BellSouth's requested relief when "the very issue that BellSouth raises in it petition – *i.e.,* the appropriate role of state public utility commissions ('PUCs') in regulating broadband Internet access services" is the subject of a pending rulemaking.[66] Hence, the Commission should dismiss BellSouth's Petition at once, and consider any changes to the classification of wireline broadband Internet access services in the appropriate forum – the *Wireline Broadband* proceeding.

The legality of the Commission's tentative conclusion – which is the sole basis for BellSouth's argument that FastAccess is an "information service" – has also been called into question by the courts. The Ninth Circuit's recent *Brand X* decision vacated and remanded the

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[64] *1998 Report to Congress,* 13 FCC Rcd at 11530 (¶ 60).

[65] *See BellSouth Petition* at 23, *citing Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3030 (¶ 20) (2002) ("*Wireline Broadband* proceeding").

[66] *See* Joint Comments of the U.S. Department of Justice, the Federal Bureau of Investigation, and the United States Drug Enforcement Administration, WC Docket No. 03-251 at 3 (filed January 15, 2004) ("*Law Enforcement*").

Commission's *Cable Modem Declaratory Ruling,* which found that a cable modem, combined with Internet access, is an "information service" under the Act.[67] The Ninth Circuit held that the declaratory ruling was inconsistent with a prior Ninth Circuit decision finding that a cable modem combines a "telecommunications service" (the broadband transmission component) with an "information service" (Internet access). The court explained:

[67] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*") *vacated and remanded, Brand X Internet Serv.'s v. FCC*, 345 F.3d 1120 (9th Cir. 2003) ("*Brand X*").

> Like other ISPs, [AT&T's cable broadband service] consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, [the cable broadband provider] controls all of the transmission facilities between its subscribers and the Internet. To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.[68]

It is hard to see how BellSouth (or the Commission, for that matter) could distinguish BellSouth's FastAccess service from the cable modem services that were examined by the Ninth Circuit. Both combine a broadband "pipeline" with the "Internet service transmitted over the pipeline" – making a "telecommunications service" under *Brand X*. There also is no basis for BellSouth's claim that *Brand X* 's holding is limited to finding the *wholesale* "DSL transmission service that BellSouth separately makes available under federal tariff" a "telecommunications service."[69] *Brand X* makes no distinction between wholesale and retail services.

As a result, BellSouth's core argument in support of preemption – that the challenged state decisions regulate an "interstate information service" – is unsound as a matter of law and policy. The argument rests upon, at best, a tentative conclusion in the *Wireline Broadband* proceeding that is contrary to the Ninth Circuit's *Brand X* decision.

III. THE STATE COMMISSIONS HAVE AUTHORITY TO ENFORCE STATE LAW IN THE CONTEXT OF INTERCONNECTION AGREEMENTS

BellSouth's final argument in support of its preemption request is that its retail and wholesale DSL services "cannot be regulated by the states" because "DSL [is] a form of interstate special access [that] is subject to the exclusive authority of this Commission."[70] This

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[68] *Brand X,* 345 F.3d at 1129, *citing AT&T v. City of Portland,* 216 F.3d 871, 877-878 (9th Cir. 2000).

[69] *BellSouth Petition* at 23.

[70] *Id.* at 29.

argument – just like BellSouth's argument that its retail broadband Internet access service is an "information service" – is totally irrelevant, for three reasons. First, the challenged state commission decisions do not primarily regulate DSL service; to the contrary, as the decisions state explicitly, they address BellSouth's attempt to remain the dominant provider of local voice services through discriminatory and anticompetitive conduct. Regardless, to the extent that the challenged state decisions do in fact affect interstate DSL services, those decisions represent wholly permissible prohibition on the withdrawal of service, rather than impermissible regulation of rates. Second, both the FCC and the courts have recognized that state commission authority over interconnection agreements pursuant to section 252 of the Act extends to both interstate and intrastate matters. Third, section 252(e)(6) – as it has been interpreted by this Commission and upheld by the courts – requires that any review of a state commission decision made pursuant to section 252 be conducted by a federal district court, *not* the FCC.

A. The *GTE ADSL Order* Addresses Rate Regulation, Not The Terms And Conditions Of Interstate DSL Services.

The four state commissions properly rejected BellSouth's argument that prohibiting its discriminatory DSL policy is inconsistent with a purported finding in this Commission's *GTE ADSL Order* that all DSL transmission service is subject to exclusive federal jurisdiction.[71] BellSouth grossly over-reads that order. The issue there was whether GTE's wholesale DSL offering was "an interstate service and … properly tariffed at the federal level."[72] The Commission agreed with GTE that its DSL service was "similar to existing special access services" that were "properly tariffed at the federal level" under the "mixed-use facilities rule."[73] The Commission "reject[ed] arguments advanced by some commenters that the Commission

[71] *See BellSouth Petition* at 25-30, *relying on GTE ADSL Order*, 13 FCC Rcd 22466.

[72] *GTE ADSL Order,* 13 FCC Rcd 22466 (¶ 1).

should defer the tariffing of DSL services to the states in order to lessen the possibility of a price squeeze," because "the Commission is well-versed in addressing the price squeeze concerns of new entrants."[74]

Under the *GTE ADSL Order*, wholesale DSL service remains tariffed at the federal level, even though the end-to-end jurisdictional analysis employed by the Commission therein has been held unlawful. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Nothing in that *Order*, however, remotely suggests that it was intended to preempt state authority to enforce state laws enacted for the protection of consumers simply because those laws happen to be implicated in the context of DSL services. To the contrary, particularly in connection with jurisdictionally "mixed-use facilities," it is obvious that the states *must* retain their inherent police powers to ensure that those facilities are not marketed or otherwise employed so as to take advantage of consumers.

Here, the challenged state decisions do not directly regulate the rates that BellSouth charges for DSL service. Instead, they concern the terms and conditions that BellSouth attaches to the sale of DSL. When those terms and conditions harm consumers in contravention of state law or diminish competition for local telephone service, state decisions that are otherwise consistent with federal law must remain in effect.[75] Accordingly, the cases cited by BellSouth in

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[73] *Id.* at 22479-80 (¶¶ 23-25).

[74] *Id.* at 22482-83 (¶¶ 30-32).

[75] *See supra,* section I. Notably, the issue of state commission jurisdiction to consider violations of state law related to a BOC's provision of DSL service offered through a federal tariff is not a new issue, and it is not limited to the states in BellSouth's region. *See California ISP Association, Complainant, v. Pacific Bell Telephone Company; SBC Advanced Solutions, Inc. and Does 1-2, Defendants,* Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendant's Motion to Dismiss, California Public Utilities Commission, Case 01-07-027 at 11 (March 28, 2002) (rejecting SBC's assertion that the California commission "does not have jurisdiction to pursue claims of fraudulent or misleading conduct, or poor service quality

its footnote 28 – which all concern actual or potential conflicts between state law and federal (primarily FERC) rates or tariffs – are inapposite.[76]

It bears emphasis that the primary goal of the challenged state decisions not only has nothing to do with rates, but little to do with DSL.[77] As the Georgia commission explained, the goal was to protect and promote the development of competition (and consumers) for local voice services, *not* to regulate DSL services:

> This Commission's decision is not telling BellSouth that it cannot sell DSL service. Nor is the Commission telling BellSouth that it cannot be compensated for selling its DSL service. It is not even telling BellSouth what price to offer for its DSL service. All the Commission is telling BellSouth is not to refuse customers an option separate from voice service in an effort to preserve its monopoly share of the voice market and insulate its voice service from the effects of competition.[78]

In sum, in ordering BellSouth to offer customers "a [DSL] option separate from voice service," the state commissions have imposed a limited regulatory obligation on BellSouth that will protect consumers and promote competition for local telephone service.[79] As a federal district court in Kentucky recently explained, the state commission's policy "establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the [state] Commission."[80] This modest requirement, on its face, is not tantamount to regulating DSL rates

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relating to DSL service" under state law "because the FCC has required a federal tariff for that service.").

[76] *See BellSouth Petition* at 27 n.28.

[77] *See Florida Order on Reconsideration,* 2002 Fla. PUC LEXIS 864 at *11, *12; *Louisiana Order,* 2002 La. PUC LEXIS 20 at *12, *13.

[78] *Georgia Order,* 2003 Ga. PUC LEXIS 38 at *50.

[79] *See, e.g., Florida Order,* 2002 Fla. PUC LEXIS 401 at *15.

[80] *Cinergy,* 2003 U.S. Dist. LEXIS 23976 at *20.

in contravention of the *GTE ADSL Order*, and BellSouth's assertion to the contrary is a red herring meant to confuse the underlying issue.

Further, as explained above, the challenged state decisions are consistent with section 251(d)(3), which allows state commissions to impose any "regulation, order or policy" so long as it does not "substantially prevent" the implementation of the federal regime. Although state commissions are constrained by the requirements in 1996 Act itself, the Eighth Circuit held that a "mere inconsistency" with the FCC's rules and regulations is not grounds for preemption under section 251(d)(3).[81] For the same reason, state commission authority to impose additional requirements under state law cannot be preempted based on a "mere inconsistency" with a federal tariff. In fact, preemption would be particularly unwarranted in the circumstances of BellSouth's case, because the tariff in question is entirely within BellSouth's control.[82] The FCC should not provide greater deference to BellSouth's tariff than to the reasoned decisions of four state commissions – particularly when BellSouth has failed to show that the challenged state decisions "substantially prevent implementation of federal statutory requirements[83] – because doing so would grant BellSouth carte blanche to authorize its own anticompetitive behavior.

B. The 1996 Act Confers Jurisdiction On State Commissions To Resolve Disputes Concerning Interstate Services Pursuant to Section 252.

BellSouth's jurisdictional argument attempting to confine state authority to strictly intrastate matters also ignores the basic structure of the 1996 Act. Pursuant to section 252(b)(4)(C), state commissions "shall resolve each issue" set forth in an interconnection agreement arbitration and may "impos[e] appropriate conditions . . . upon the parties to the

[81] *Iowa Utilities Board*, 120 F.3d at 807.

[82] *See Georgia Order,* 2003 Ga. PUC LEXIS 38 at *4.

[83] *Cinergy,* 2003 U.S. Dist. LEXIS 23976 at *20.

agreement." Three of the four state commissions whose decisions BellSouth now asks the FCC to preempt were presented with BellSouth's discriminatory DSL policy in the context of interconnection agreement arbitrations brought before them pursuant to section 252 of the 1996 Act.[84] Importantly, as both the courts and this Commission have recognized, section 252 does not confine a state commission's jurisdiction to purely intrastate matters.[85] As the Fifth Circuit explained, the Act does *not* "divide the world of domestic telephone service 'neatly into two hemispheres,' one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction."[86] Since the *First Local Competition Order*, the FCC has held that state commission authority over

[84] The Florida commission issued its decisions at the end of arbitration proceedings between BellSouth and two CLECs, Florida Digital Network, Inc. and Supra Telecommunications. *See BellSouth Petition* at 6-7. The Kentucky commission issued its decisions in an arbitration proceeding between BellSouth and Cinergy Communications Company. *See id.* at 8. And the Georgia commission issued its decision in a complaint proceeding concerning the proper interpretation of an interconnection agreement between BellSouth and MCImetro Access Transmission Services, LLC, that it had previously arbitrated under section 252. *See id.* at 9. Further, BellSouth has asked the Commission to preempt pending section 252 arbitrations concerning the same issue in Alabama, Tennessee, and Mississippi. *See id.*

[85] The cases cited by BellSouth in n.28 – which do attempt to confine state authority to intrastate matters – predate the 1996 Act. Accordingly, they have nothing to do with state commission authority to arbitrate "any open issue" presented to it in a section 252 arbitration.

[86] *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000) ("*Texas PUC*") *citing Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *see also Michigan Bell,* 323 F.3d at 352 ("Much of the [Act's] complexity has resulted from … the concept of 'cooperative federalism,'" a concept under which "'federal and state agencies should endeavor to harmonize their efforts with one another, while federal courts oversee this partnership by insisting on articulations of regulatory policy that respect the values embodied in the underlying legislation.'") *citing* Phillip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act,* 76 N.Y.U. L. Rev. 1692, 1732 (2001); *Cinergy*, 2003 U.S. Dist. LEXIS 23976 at *19-*20.

interconnection agreements pursuant to section 252 is not based on traditional jurisdictional boundaries.[87] As the Commission explained,

[87] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499 (1996) ("*First Local Competition Order*").

> [W]e find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole. As we indicated in the NPRM, it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[88]

Under this same reasoning, the Fifth Circuit rejected SBC's arguments that the Texas commission lacked authority to impose reciprocal compensation on Internet traffic because such traffic is interstate in nature. The court found that "regardless of any interstate aspect of the subject telecommunications" the state commission could "properly exercise[] its jurisdiction" under section 252.[89] This reasoning is just as applicable to BellSouth's current attack on the decisions of the Florida, Georgia, and Kentucky commissions in its pending Petition. BellSouth's discriminatory DSL policy concerns whether BellSouth can refuse to sell its DSL service to consumers served by CLECs that utilize the UNE platform, a combination of network elements that BellSouth must provide pursuant to sections 251(c)(3) and 271. Any disputes about the rates, terms, and conditions on which the UNE platform is offered are properly resolved by the state commission pursuant to sections 252(b)(1), 252(c), and 252(e). Accordingly, when BellSouth's discriminatory DSL policy was properly raised in section 252 arbitration proceedings, this conferred jurisdiction on the state commissions to resolve any disputes over it, regardless of whether BellSouth's underlying DSL line is an "interstate" service.[90] Similarly, once this issue became the subject of a section 252 arbitration proceeding,

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[88] *See id.* at 15544 (¶ 84).

[89] *Texas PUC,* 208 F.3d at 480.

[90] The courts have also recognized a state commission's authority to interpret and enforce previously-approved interconnection agreements, as is the case with the *Georgia Order. See Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.,* 235 F.3d 493, 497 (10th Cir. 2000); *see also Texas PUC*, 208 F.3d at 479.

the state commissions were allowed to "enforce[] other requirements of State law," including provisions in state statutes that prohibit BellSouth's discriminatory DSL policy.[91]

C. The Federal District Courts – Not The FCC – Have Jurisdiction To Review The Challenged State Decisions.

BellSouth is entitled to seek substantive review of the state commission arbitration decisions that it challenges in its Petition. But by filing with the FCC, BellSouth has sought such a review in the wrong venue. The 1996 Act makes clear that BellSouth can only attack the merits of a state decision made pursuant to section 252 in federal district court.[92]

The 1996 Act provides that "[I]n any case in which a State commission makes a determination under [section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court . . . ."[93] The courts are unanimous that appellate jurisdiction is exclusive in the district courts,[94] and "the statute does not authorize the Commission to sit as an appellate tribunal to review the correctness of state resolution of such

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[91] 47 U.S.C. § 252(e)(3). *See also U.S. West Communications, Inc. v. Sprint Communications Co., L.P.,* 275 F.3d 1241, 1245 (10th Cir. 2002) ("a state commission is free, subject to the provisions of 47 U.S.C. § 253 to 'establish[] or enforce other requirements of State law in its review of an [interconnection agreement], including requiring compliance with intrastate telecommunications service quality standards or requirements'") (internal citations omitted).

[92] BellSouth challenges Louisiana commission decisions that were issued as part of the its investigation into BellSouth's compliance with section 271(c)(2)(B) of the 1996 Act, including section 271(c)(2)(B)(ii) ("checklist item ii") (requiring "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."). *See Louisiana Order* at 1. Because the Louisiana commission's decisions adopted measures geared at ensuring BellSouth's ongoing compliance with the nondiscrimination requirements in section 251(c)(3), as incorporated into checklist item ii, these decisions should be challenged in the same venue that reviews state commission arbitration provisions implementing section 251(c)(3) – federal district court.

[93] 47 U.S.C. § 252(e)(6).

[94] *See, e.g., Texas PUC,* 208 F.3d at 479 ("the Act confers jurisdiction on the district court to review the PUC's determination for compliance with the Act, specifically sections 251 and 252"); *Indiana Bell Tel. Co. v. Smithville Tel. Co.,* 31 F. Supp. 2d 628, 631 (S.D. Ind. 1998) ("A decision by the State agency approving or rejecting an agreement and implementing the 1996

disputes."[95] In fact, BellSouth has effectively conceded this point by appealing the critical decisions of the Florida, Georgia, Kentucky, and Louisiana commissions to federal district court.[96] Z-Tel therefore agrees that "it would be premature for the Commission to act on the BellSouth Petition before such federal courts have acted on the appeals."[97] And in the case of the Kentucky commission's decision, preemption would be particularly inappropriate and would violate the Constitutional separation of powers given that the federal district court has already ruled against BellSouth and affirmed the Kentucky commission's order.[98] As the Second Circuit has held, "[a] judgment by an Article III court having jurisdiction to enter that judgment is not subject to review by a different branch of government."[99]

The Commission itself has consistently relied on this interpretation of section 252(e)(6) to dismiss similar collateral attacks on state commission arbitration decisions by different ILECs. For example, in rejecting an Emergency Petition for Declaratory Ruling filed by ACS of Anchorage, Inc. – which had asked the Commission to preempt UNE rates established by the Regulatory Commission of Alaska – the Commission explained that "[w]hen the question presented is whether a state commission's determination under section 252 was correct on the merits, the remedy for a party seeking review of that determination is with the courts."[100]

Act, may be reviewed only by a federal district court."); *id.* at 636 ("Such review is presumed to be the exclusive means of challenging state commission determinations under § 252.").

[95] *Global Naps v. Verizon,* 291 F.3d 832, 837 (D.C. Cir. 2002).

[96] *See BellSouth Petition* at 6-9.

[97] *Law Enforcement* at 4.

[98] *See Cinergy*, 2003 U.S. Dist. LEXIS 23976.

[99] *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1992).

[100] *ACS of Anchorage, Inc. and ACS of Fairbanks, Inc.; Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Sections 201(b) and 252(e)(5) of the Communications Act*, Memorandum Opinion and Order, 17 FCC Rcd 21114, 21121 (¶ 12) (2002) ("*ACS Preemption Order*"); *see also Petition for Commission Assumption of Jurisdiction of Low Tech Designs,*

Moreover, "[a] contrary interpretation . . . would invite parties who are unhappy with a state commission's determination to use the Commission's preemption procedures to attempt to obtain a more favorable result."[101] That, of course, is the fundamental goal of BellSouth's Petition.[102]

CONCLUSION

Consistent with the express terms of the statute and prior Commission precedent, the FCC should immediately dismiss BellSouth's Petition, which is nothing more than a naked display of forum shopping. BellSouth has already sought review of the challenged state decisions in federal district court. Asking this Commission to engage in a preemption proceeding prior to the outcome of these judicial proceedings not only wastes industry and Commission resources, it also undermines the spirit of "cooperative federalism" that runs through the 1996 Act.[103]

Respectfully submitted,

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Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1774-75 (¶ 36) (1997).

[101] *ACS Preemption Order,* 17 FCC Rcd 21121 (¶ 12).

[102] BellSouth makes much of the fact that the *TRO* "invited parties to file petitions for declaratory ruling" to address "improper state decisions." *BellSouth Petition* at 3, *citing TRO*, ¶ 195. That "invitation" is irrelevant here. Paragraph 195 of the *TRO* addressed the possibility that state commissions might order additional "unbundling of network element[s]" inconsistent with the federal regime. As explained *supra*, section I.D., the challenged state decisions do not order *any* additional unbundling, let alone unbundling inconsistent with the federal scheme.

[103] *Cinergy*, 2003 U.S. Dist. LEXIS 23976 at *15, *19.